FILED
APR 10 1998
CLERK

No. 97-1603

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1997

TOTAL FOODS; THOMPSON CANDY; NABISCO BRANDS, INCORPORATED; UNITED DISTRIBUTIVE WORKERS COUNCIL 30, RWDSU AFL-CIO; DUANE WILSON & ASSOCIATES; JOHN ROEHRIG; and SANDERS CONFECTIONERY PRODUCTS, INC.,

Petitioners,

V.

JAY ALIX, Individually and as Trustee,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BODMAN, LONGLEY & DAHLING LLP
Michael B. Lewiston
David G. Chardavoyne
Robert J. Diehl, Jr.
100 Renaissance Center, 34th Floor
Detroit, Michigan 48243
(313) 259-7777

Counsel for Respondent

No. 97-1603

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1997

TOTAL FOODS; THOMPSON CANDY; NABISCO BRANDS, INCORPORATED; UNITED DISTRIBUTIVE WORKERS COUNCIL 30, RWDSU AFL-CIO; DUANE WILSON & ASSOCIATES; JOHN ROEHRIG; and SANDERS CONFECTIONERY PRODUCTS, INC.,

Petitioners,

V.

JAY ALIX, Individually and as Trustee,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BODMAN, LONGLEY & DAHLING LLP
Michael B. Lewiston
David G. Chardavoyne
Robert J. Diehl, Jr.
100 Renaissance Center, 34th Floor
Detroit, Michigan 48243
(313) 259-7777

Counsel for Respondent

QUESTION PRESENTED

Can petitioners be granted certiorari where their petition raises no challenge to the opinions of the lower courts in this case?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS TO DENY THE WRIT 6

I. Petitioners do not challenge the legal and factual bases of the decisions of the lower courts. 6

II. The petition for certiorari contains many irrelevant, unsupported, and otherwise untrue assertions 7

III. Conclusion 8

TABLE OF AUTHORITIES

Cases **Page(s)**

Sanders Confectionery Products, Inc. v Heller Financial, 973 F.2d 474 (6th Cir. 1992), cert den'd, ____ U.S. ____, 113 S.Ct. 1046, 122 L.Ed.2d 355 (1993)

Statutes

Bankruptcy Code, Chapter 11, 11U.S.C. 1101 et seq.
11 U.S.C. 321
11 U.S.C. 1104(b)

No. 97-1603

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1997

TOTAL FOODS; THOMPSON CANDY; NABISCO BRANDS, INCORPORATED; UNITED DISTRIBUTIVE WORKERS COUNCIL 30, RWDSU AFL-CIO; DUANE WILSON & ASSOCIATES; JOHN ROEHRIG; and SANDERS CONFECTIONERY PRODUCTS, INC.,

Petitioners,

V.

JAY ALIX, Individually and as Trustee,

Respondent.

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioners attempt here to have a third appeal from the decision of the Bankruptcy Court to dismiss petitioners' motions to replace Mr. Jay Alix as the trustee in bankruptcy for Fred

Sanders, Inc. The facts crucial to the appeal were summarized by the Sixth Circuit in its opinion affirming the opinions of the Bankruptcy Court and of the District Court:

> "Debtor, Fred Sanders, Inc. ("FSI"), filed a petition for protection under Chapter 11 of the Bankruptcy Code on November 16, 1987 (hereinafter "bankruptcy proceeding"), after its major creditor, Heller Financial Services, Inc. ("Heller"), foreclosed on its loans. Contemporaneously with the filing of the petition, FSI moved for the appointment of an examiner. Apparently defendant Jay Alix was suggested for this function, but when creditors objected, Alix was not named. On December 4, 1987, Alix was appointed operating trustee in the Chapter 11 proceedings. The record reflects no objections to his appointment, and no appeal was taken from the order appointing him.
>
> "On May 4, 1987, the bankruptcy court entered an order confirming the plan of reorganization. No appeal was taken from this order.
>
> "On February 6, 1989, almost two years after entry of the order confirming the plan, two things happened. First a collection of creditors and interested parties filed a suit in federal court against Heller, Alix and others. The action was entitled Sanders Confectionery Products, Inc. v. Heller Financial, 973 F.2d 474 (6th Cir. 1992) (hereinafter Sanders) The Sanders complaint alleged lender liability, fraud, securities violations, RICP violations, and conspiracy. The

complaint made vague reference to the claim that Alix was not 'disinterested' and therefore should not have been appointed trustee, but did not seek Alix's removal as trustee. Second, and also on February 6, 1989, Sanders Confectionery Products, Inc., the parent company of the debtor and an unsecured creditor in the bankruptcy proceedings, filed a motion in those proceedings to have Alix replaced as trustee, claiming that Alix was not disinterested and had failed to disclose his interest to the bankruptcy court.

"Heller opposed the motion filed in the bankruptcy proceeding and filed a motion in Sanders to withdraw the reference to the bankruptcy court of the Fred Sanders, Inc. Bankruptcy proceeding for the limited purpose of deciding the motion to replace the trustee. Eventually, the district court, without mentioning the motion to withdraw the reference, dismissed all of the plaintiffs' claims in Sanders on res judicata grounds, holding that each of those claims was barred by the final order of the bankruptcy court confirming the FSI Chapter 11 plan. We affirmed that judgement. Thereafter, the bankruptcy court dismissed on res judicata grounds the motion to replace Alix as trustee. The district court affirmed that judgment, holding that the order of confirmation in the Chapter 11 proceedings barred the motion, and noting in a footnote that the judgment in Sanders precluded the motion as well. This timely appeal followed.

"The essence of the motion to replace Jay Alix as trustee is the movants' claim that Alix was

not eligible to be appointed trustee because he was not disinterested as required by the Bankruptcy Code, and he had failed to disclose this fact to parties to the bankruptcy proceedings and the bankruptcy court. Alix's alleged interest stems from his prior relationship with Filipp Kreissl, the president of both FSI and FSI's parent company, Sanders Confectionery Products, Inc. ("SCPI"). Prior to 1984, Alix worked for Kreissl in a non-related accounting consulting company known as KWD Group, Inc. While employed by Kreissl, Alix did limited work for FSI. Alix and Kreissl had a falling out; Alix either resigned or was fired; a lawsuit resulted, and the suit was settled.

"The record reveals that Filipp Kreissl knew about the alleged interest. It is undisputed that prior to being appointed trustee, Alix was suggested of appointment as examiner in the Chapter 11 proceeding and Kreissl objected to the appointment because of Alix's past relationship to Kreissl. In addition, affidavits submitted in support of the motion to replace Alix reveal that other creditors and interested parties knew about the trustee's interest early in the bankruptcy proceedings. In her affidavit, the Secretary-Treasurer of the union which represented FSI employees states that in a meeting held 'shortly after the appointment of Alix as trustee' Alix said, 'I would work for nothing, if I could get even with Fil Kreissl.' Another affiant, John Schamante, a creditor and a member of the Creditors committee in FSI's bankruptcy, makes it clear that the Creditors' committee knew about the trustee's interest early in the bankruptcy proceedings.

According to Schamante's affidavit, the Creditors Committee discussed in meetings held '[s]hortly after Mr. Alix's appointment.....,' Alix's relationships with and attitudes toward various parties to the bankruptcy proceeding. Despite this early knowledge of Alix's alleged interest, no party chose to object to Alix's appointment or more for his removal in a timely manner."
(A-2 to A-5) (footnotes omitted).

REASONS TO DENY THE WRIT

I. Petitioners do not challenge the legal and factual bases of the decisions of the lower courts.

The issues decided below were: (a) whether prior rulings in other proceedings can limit the factual allegations which can be used to remove a bankruptcy trustee; and (b) whether the entry of the order confirming the plan of reorganization prevents removal of the trustee for reasons that could have been raised before that event. All three lower courts (the U.S. Bankruptcy and District Courts for the Eastern District of Michigan and the U.S. Court of Appeals for the Sixth Circuit) responded in the affirmative, holding that the doctrine of res judicata barred motions to replace a bankruptcy trustee if the facts relied on were known to movants, but were not brought to the attention of the court, before the Bankruptcy Court entered the confirmation order.

The petition for writ of certiorari does not challenge the legal and factual analysis used by the lower courts to reach the conclusion that res judicata bars petitioners' removal motions. To the contrary, petitioners concede that:

> "This is not a case concerning whether the District Court and the Sixth Circuit were correct in their precise holding whether the objections to Jay Alix's conflict of interest were timely made." (Petition for Writ of Certiorari, p. 9).[1/]

[1/] Therefore, respondent will not repeat his argument regarding res judicata except to adopt the reasoning of the Sixth Circuit on that issue (A-6 to A-8).

Thus, there is no reason for the Supreme Court to grant the writ to consider, for the fourth time in this proceeding, the application of the doctrine of res judicata to the removal motions.[2]

II. The petition for certiorari contains many irrelevant, unsupported, and otherwise untrue assertions.

The Supreme Court should deny the writ for one other reason as well: the petition demonstrates that petitioners cannot effectively represent the issues. The petition for writ of certiorari is a bizarre amalgam of matters totally irrelevant to the issues decided by the lower courts and of assertions made without reference to the record (including statements that are patently false). The Supreme Court should decline to address any issue where a petitioner has demonstrated such a strong preference for the irrelevant and the untrue.

For example, petitioners argue that the Court should grant the writ because of a criminal case in federal court in Wisconsin against an attorney. That attorney, his law firm, the debtor in that case, and the court in Wisconsin have nothing to do with the present proceeding. Conversely, the doctrine of res judicata does not appear to have been an issue in that criminal case.

Equally irrelevant are petitioners' many references to Mr. Alix's prominence in his field and to his service on the National Bankruptcy Review Commission. Although Mr. Alix is, indeed, well known and well respected nationally among

---

[2] The present petition for a writ of certiorari is, in fact, petitioners' seventh attempt to argue that the doctrine of res judicata does not bar their jeremiad against Mr. Alix. In addition to their four attempts in the present preceding, petitioners were unsuccessful with that argument three times in *Sanders*: in the District Court, on appeal to the Court of Appeals, and in their petition to the Supreme Court for a writ of certiorari.

bankruptcy practitioners and among judges dealing with bankruptcy issues, his reputation has no bearing on the application of the doctrine of res judicata here and certainly has no bearing on any consideration of whether Mr. Alix acted properly.

Petitioners also make several untrue statements. For example, it is not true that Mr. Alix was required by 11 U.S.C. 321 and 11 U.S.C. 1104(b) to disclose Mr. Alix's dealings with Mr. Kreissl, that those dealings would have disqualified Mr. Alix from serving as trustee for Sanders, or that any court has ever held that Mr. Alix should have disclosed those dealings. Likewise, petitioners' allegation that the Bankruptcy Court violated the law out of fear, or for administrative convenience, are outrageous lies and totally unsupported by the record.

Finally, although petitioners concede, for the first time, that they did indeed know of Mr. Alix's dealings with Mr. Kreissl, they now allege, also for the first time, that they relied on the Bankruptcy Court to address the situation (even though they received no indication that the court was doing so). This new argument has no factual support, is ridiculous on its face, and contradicts petitioners' assertions in the lower courts.

III. Conclusion.

The debtor was reorganized almost ten years ago. Since then, Messrs. Kreissl and J. Sanders have conducted a vendetta against Mr. Alix. In this most recent incarnation of that vendetta, petitioners cannot even point to any issue that brings into question the decision of the Sixth Circuit or of the other lower courts. Respondent respectfully prays, therefore, that this Honorable Court affirm the decision of the Bankruptcy Court for the Eastern

District of Michigan dismissing petitioners' removal motions and dismiss the Petition for Writ of Certiorari.

David G. Chardavoyne
Counsel of Record
BODMAN, LONGLEY & DAHLING LLP
100 Renaissance Center
34th Floor
Detroit, Michigan 48243
(313) 259-7777

Attorneys for Respondent

PROOF OF MAILING

I certify that on April 10, 1998, I mailed three copies (each) of the Response to Petition for Certiorari to:

Richard L. Roble, Esq.
Richard L. Roble, J.D., P.C.
219 W. York Street
P. O. Box 10033
Savannah, GA 31412-0233

by First Class Mail.

_____

Subscribed and sworn to before me
a Notary Public on April 9, 1998

_____